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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 202

EDDIE DEAN GRIFFIN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Summary Statement of the Case

Eddie Dean Griffin was charged in an information with murder, in violation of Section 187, Penal Code of California, of one Essie Mae Hodson on December 4, 1961, in Los Angeles, California. (C.T. 3) The defendant was also charged with two prior felony convictions: rape in Illinois in 1946 and of being a sexually dangerous person in Illinois in 1955. (C.T. 4) The second prior, being a sexually dangerous person, was later withdrawn and dismissed by the court. (C.T. 78)

The preliminary hearing was held in the Municipal Court of the Los Angeles Judicial District, Los Angeles County,

California, and on May 5, 1962, the defendant was held to answer. (C.T. 2) Thereafter, on May 22, 1962, the information mentioned above was filed against him. (C.T. 3) After arraignment and appointment of the Public Defender in Department 100, Superior Court of Los Angeles County, California, the case was assigned to Department 110, the Honorable Joseph L. Call, Judge, presiding. A plea of "not guilty" was entered and the cause set for trial on July 2, 1962. (C.T. 5-7) On July 2, 1962, on motion of defendent, the case was continued for trial to August 27, 1962. (C.T. 8)

Apparently, after another continuance on October 9, 1962 trial commenced. The defendant admitted both prior felony convictions. Jurors were selected. (C.T. 9)

On October 10, 1962, the People made an opening statement and commenced presenting testimony. (C.T. 10)

On October 16, 1962, the People rested their case. The defense then presented its evidence and rested. The defendant did not testify. (C.T. 13)

On October 17 and 18, 1962 both counsel presented argument to the jury. The jury was instructed and retired to deliberate at 2:38 p.m. (C.T. 15)

On October 19, 1962, the jury found the defendant guilty of murder in the first degree. (C.T. 77)

On October 24, 1962 the motion of defense counsel for a new trial and reduction of the conviction to second degree was submitted. The second prior was withdrawn and ordered stricken. On motion of defendant, the penalty trial was continued to October 29, 1962. (C.T. 78)

On October 29, 1962 the motion of defense counsel to suppress People's evidence to be offered on the penalty issue, concerning an offense of which defendant had been

found "not guilty" in Mexico was denied. Dr. Marcus Crahan was appointed to examine the defendant pursuant to Section 1871, Code of Civil Procedure of California. The People presented evidence on the penalty issue and rested. (C.T. 79)

On October 30, 1962 the defense continued with evidence on the penalty issue. The defendant testified. Both sides rested.

Eddie Dean Griffin, an indigent negro, 50 years of age, was charged in an information, No. 258541, in the Superior Court of Los Angeles County, of the crime of murder on the 4th day of December 1961. It was alleged that he killed Essie Mae Hodson, a negro woman. He was also charged with two prior felony convictions, to-wit: the crime of rape, alleged to have been committed on May 2, 1944, for which he served a term of imprisonment in State Prison in Illinois. Also, on September 14, 1955, he was convicted in Illinois of the crime of "sexually dangerous person, a felony" and sentenced to prison. The defendant had no means to employ counsel to defend himself and the Public Defender of Los Angeles County was appointed. Upon the conclusion of the appeal in the State court, that office asked present counsel to carry the case to the United States Supreme Court.

It appears from the record that the defendant, on December 2, 1961, met Eddie Seay and a friend of Eddie's, named Al, on a street corner in Los Angeles and asked them how to get to the 41st Street Club, a nearby bar. A bottle of wine was purchased. About 9 o'clock Eddie and Al entered the 41st Street Club and sat in a booth with Essie Mae Hodson and two other people. Eddie had been living with Essie Mae since 1957 and referred to her as his common law wife. About 1 o'clock Essie Mae left and Eddie and the defendant remained in the bar until 2 o'clock. They all had been drinking. Eddie was fairly intoxicated and he thought the defendant was also and invited the defendant

to stay at his apartment, which he and Essie Mae shared. The defendant was told he could sleep on a day-bed in the living room. Later, during the night, there was a noise and a struggle and Essie Mae told him that the defendant had put his hand over her mouth and tried to make her accept him for sexual relations. Eddie took the defendant down the back stairs and out of the building. Five minutes later Eddie heard the defendant knocking and the sound of glass breaking and the defendant came in the back door. About 7 o'clock the next morning Alfredo Villasenor walked down an alley behind the apartment building looking for a piece of scrap lumber. He saw Essie Mae, the deceased, who had blood on her clothes. She was trembling and apparently suffered a severe beating. She was sitting on top of a sawdust box and appeared to be in shock and could barely state her name. She was taken to the receiving hospital and treated for bruises but was unable to answer questions. She died the following day. An examination of her genital organs failed to reveal the presence of spermatozoa.

Defendant was charged with her murder. He was arrested in Mexicali, Mexico, where he was questioned. He had previously been tried in Mexico for an alleged rape and had, in effect, been found not guilty and he was released there. Nevertheless, the court, in the instant case, permitted the testimony of the two witnesses in Mexico who testified against the appellant there to be produced by the prosecution and their testimony was again admitted in the court in spite of the acquittal. Also, the defendant was penniless and tried to get the officials of the Mexican court and government to appear but was unable to do so.

The defendant did not take the stand during his trial but stood upon his constitutional rights. Nevertheless, the prosecutor was permitted to comment on his failure to take the witness stand and the court instructed the jury that

"it is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely on his own decision. As to any evidence or facts against him which the defendant can be reasonably expected to deny or explain because of facts within his knowledge, if he does not testify or if though he does testify he fails to deny or explain such evidence the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable."

Defendant was found guilty of first degree murder on October 19, 1962 and in the penalty phase of the trial the penalty was fixed of death on November 2, 1962 and the death warrant was forwarded to the prison on September 5, 1963. The State of California affirmed the judgment but with a dissenting opinion by Justice Peters in which he stated as follows:

> "Defendant denied having committed the Mexican offense. This created no more than a conflict in the evidence. But the real question is whether defendant had committed this crime. It had been judicially determined in Mexico that there was not sufficient evidence to show that defendant had committed the offense. As the majority correctly point out, '[d]efendant was brought to trial by a Mexican court on a charge of rape and released,' that is, acquitted. But, in the prosecution in Los Angeles, the two principals in the Mexican case were permitted to testify to the very facts that had led the Mexican court and investigating officials to release the defendant. Defendant was compelled to rely on his version of the facts, unsupported by corroborating testimony. The credibility of the prosecution witnesses

had already been judicially passed on adversely in Mexico. But now the defendant was called upon to once again face those very same witnesses. He was called to answer the argument of the prosecution that the Mexican court had 'made a mistake' and 'I ask you ladies and gentlemen not to perpetuate the error.' The prosecuting attorney several times told the jury that through his Mexican witnesses he had demonstrated that defendant had committed the offense in Mexico. The jury was told by the rulings on the evidence, and the arguments of the prosecutor, that it could not only believe these witnesses who testified as to the Mexican offense, but that it could, in effect, determine for itself whether the Mexican offense had been committed. They were told by the prosecutor that, if they came to the conclusion that the offense had been committed, they could consider that fact in determining what penalty to impose. This was unfair and deprived defendant of a fair trial on the penalty issue.

"The general rule is, of course, that evidence of other offenses is not admissible. To this rule there are several exceptions—but all of them relate to 'other offenses.' It is a far cry from the general rule to now hold, as do the majority, that, even though the defendant has been acquitted of the prior charge, evidence that he in fact committed the offense is now admissible. I realize that the rules of evidence and the proper scope of inquiry, on the penalty phase of the trial, are very broad. By section 190.1 of the Penal Code, on that phase of the trial, evidence 'of the defendant's background and history,' can be admitted. This court, quite properly, has interpreted this provision very liberally, both for defendant and the prosecution. Under the broad provisions of this section it is proper to inquire into all facets of the character of defendant and to show the

jury just what kind of man he is. Under this liberal rule of admission it may be that the prosecution on the penalty phase of the trial could introduce the fact that defendant had been *charged* in Mexico with rape and that he had been acquitted. That is part of his background and history. But to detail the circumstances of the alleged crime through the mouths of witnesses that had not been believed in Mexico was to place the defendant in double jeopardy for the same offense in a very real sense. If there is to be a collateral estoppel against a defendant (Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd., 58 Cal.2d 601, 604 [25 Cal.Rptr. 559, 375 P.2d 439]) there should also be a collateral estoppel in his favor.

"Aside from this reason why detailed evidence of other crimes alleged to have been committed in a foreign country where defendant has been acquitted in that country should not be admitted, there is another sound practical consideration that compels the exclusion of such testimony. Indigent defendants who have to be represented by the public defender, as did defendant here, are not in a position of financial equality with the prosecution, nor do they have the same means of persuasion as does the prosecution. This court and the United States Supreme Court, in a whole series of recent cases, and properly so, have been quite zealous in protecting the rights of indigent defendants against improper invasion. The defense is in no position, as is the prosecution, to induce witnesses to come to this country to testify. In this very case, the record shows that the public defender's office, with its limited resources, did send an investigator to Mexico to try and induce the Mexican trial judge, and the Mexican investigating officers to come to Los Angeles to testify, even offering to pay their expenses. The witnesses

would not come. There was no way to compel them to come. But the prosecution could and did induce the two principals in the Mexican court to come to Los Angeles to testify. Thus, these biased witnesses, who could not convince a court in their own country, who were not believed when the facts were fresh in their minds, were permitted to testify as to the circumstances of the case, while the defense was required to rely on defendant's unsupported and uncorroborated denial of these circumstances. Thus, the rule, approved by the majority, results in a denial of due process and a denial of that fair trial guaranteed by the state and federal Constitutions."

Opinion Below

The opinion of the Supreme Court of California appears in *People* v. *Griffin,* 60 Adv.Cal. 129, and a copy of said opinion is attached hereto as Appendix A.

Jurisdiction

Jurisdiction is conferred upon this Court by the provisions of the Fourteenth Amendment to the Constitution of the United States in its due process and equal protection clause and by the provisions of Title 28, Section 1257, U.S. Codes, and by the Rules of this Honorable Court; also by the provisions of Title 28, Section 1915, U.S. Codes. The judgment in the case was pronounced by the Supreme Court of California on July 18, 1963; a petition for rehearing was denied August 14, 1963. A petition for writ of certiorari was duly filed in this Court, which petition was granted, No. 700 Misc., on June 22, 1964, and the case was transferred to the appellate docket and placed on summary calendar.

Constitutional Provisions and Statutes Involved

This appeal involves the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States, Sections 187, 189, 190 and 190.1 of the Penal Code of California and Section 1915 of the Code of Civil Procedure of the State of California. These provisions are set forth in Appendix B to this brief.

Questions Presented

1. Whether defendant was deprived of his right not to be compelled in his case to be a witness against himself in violation of his constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.

2. Whether the defendant was deprived of his right to a fair trial in violation of his constitutional rights to due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States because:

a. The court erred in admitting evidence produced by the prosecution of testimony of witnesses of the commission by the defendant of the crime of rape, a felony, in Mexicali, Mexico, on or about December 19, 1961, where the defendant had, in effect, been found not guilty of the charge by Mexican courts.

b. The district attorney was guilty of such prejudicial misconduct as to deprive the defendant of such a fair trial as is required by due process of law.

3. Whether the evidence was insufficient, as a matter of law, to sustain the conviction of murder in the first degree, or in any degree.

ARGUMENT

I.

The Defendant Had a Constitutional Right to Remain Silent. It Was a Violation of the Fifth and Fourteenth Amendments to the United States Constitution to Permit the Prosecution to Use His Constitutional Privilege as a Sword to Convict Him Rather Than as a Shield to Protect Him. Article 1, Section 13, of the Constitution of California, Inherently and as Construed and Applied in This Case, Violates the Fourteenth Amendment to the Constitution of the United States. Adamson v. California, 332 US 446, Should Be Overruled in the Light of Malloy v. Hogan.

The defendant in this case chose not to take the witness stand. Nevertheless, the fact that he stood upon his constitutional rights was used as a weapon against him to convict him. The prosecution made a forceful argument to the effect that if the defendant was able to explain he would have taken the stand. This was misconduct by the prosecutor as he knew that the defendant had suffered prior convictions of a felony and that he would be seriously impeached and badly reflected upon before the jury. This court has now reversed *Adamson v. California,* in which a 5 to 4 decision previously held to the contrary and *Malloy v. Hogan,* 378 US 1, 12 L.ed.2d at 653 now holds that such procedure violates due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. It would be unconscionable to permit the prosecution to use a privilege guaranteed by the Constitution as a weapon to convict a defendant, as was done in this case.

In *Malloy* v. *Hogan,* 378 US 1, 12 L.ed.2d 653, 658, this Court said:

> "We hold today that the Fifth Amendment's exception from compulsory self-incrimination is also pro-

tected by the Fourteenth Amendment against abridgement by the States. Decisions of the Court since Twining and Adamson have departed from the contrary view expressed in those cases."

We respectfully urge this Court now to reverse the *Griffin* case on the basis of *Malloy* v. *Hogan* and also to reaffirm its discarding of the *Adamson* v. *California* decision and opinion.

Charles T. McCormick makes the following statement in part at pages 280 and 281 of his work on "Evidence", published in 1954:

> "... But a more substantial motive is created by the rule which permits the prosecutor to cross-examine the accused upon his past convictions of crime. Here the accused may well tremble before he takes the stand. Of course, he should acknowledge his criminal record on direct examination, rather than have it extorted on cross. But even so (and particularly when the past crimes are of like nature with the present charge) the jury will be heavily prejudiced against a man who is thus revealed as a jail-bird. Accordingly, the proposals of the Uniform Rules which allow comment but forbid the cross-examiner to question the accused as to past convictions or otherwise prove them, seem humane and just. Another modification deserving of consideration is that of confining the function of comment on the defendant's silence to the judge, as in England and in Connecticut ..."

In the instant case, the court instructed the jury in part:

> "... As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails

to explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences they may reasonably draw therefrom those unfavorable to the defendant are the more probable . . . ' (See Caljic No. 51, and C.T. 57).[1]

The district attorney took full advantage of this instruction and forcefully argued that if the defendant had any possible explanation he should have taken the witness stand. (See R.T. 605-A64, line 18 to 605-A66, line 4; R.T. 605-A158, line 1 to 605-A160, line 18; and R.T. 605-A168, lines 5 to 21.)[2]

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[1] "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

"In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such essential element."

[2] R.T. 605-A64, line 18 to 605-A66, line 4:

"It is my contention that if the defendant had not beaten, dragged or pushed, and I don't mean drug all the way down

II.

It Was a Violation of Due Process of Law and the Equal Protection of the Laws to Allow the Introduction of Evidence From Mexico on a Case Where He Had Been, in Effect, Acquitted. It Was Unfair Trial Procedure.

The court erred in admitting evidence produced by the prosecution's testimony of witnesses of the commission by the defendant of the crime of rape with injuries, a felony, in Mexicali, Mexico, on or about December 19, 1961, where the defendant had, in effect, been found not guilty of the

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the alley, I don't know what he did, he won't take the witness stand and tell you in this courtroom under oath what he did.

"A defendant has a constitutional right not to become a witness in his own behalf.

"When a defendant does not become a witness, there is no link, if there be a missing link in the People's case, that is supplied by the defendant's failure to take the stand and testify.

"But if there are complete links but some of them are weak and the defendant would have the specific knowledge to explain or deny, then the failure of the defendant to explain or deny as a w tness creates a situation in which the inferences unfavorable to the defendant are the more probable and the weak link, if any, not the missing link, the weak link is strengthened.

"The defendant certainly knows whether Essie Mae had this beat up appearance at the time he left her apartment and went down the alley with her.

"What kind of a man is it that would want to have sex with a woman that beat up if she was beat up at the time he left?

"He would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.

"These things he has not seen fit to take the stand and deny or explain.

[*Footnote continued on page 14*]

charge by a Mexican court. The use of this evidence violated due process of law and the equal protection of the laws since California also has a statute which provides:

"A final judgment of any other tribunal of a foreign country having jurisdiction, according to the laws of such country, to pronounce the judgment shall have

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[*Footnote continued from page 13*]

"And in the whole world, if anybody would know, this defendant would know.

"Essie Mae is dead, she can't tell you her side of the story. The defendant won't."

R.T. 605-A158, line 1 to 605-A160, line 18:

"Now, the problem so far as I am concerned, boils itself down to something like this: When I suggest in my opening argument that Mr. Maple is playing games with Mr. Villasenor rather than searching for the truth, the first thing Mr. Maple does when he begins his argument is to rebut that unfavorable—perhaps unfair suggestion. But that isn't what the defendant in this case does with reference to anything that tends to put him in an unfavorable light, something that he would know if anybody would know: He remains silent, and I point this out to show that if somebody knows something is not true, the natural inclination is to stand up and deny it, just as Mr. Maple did it in his argument.

"Now Mr. Maple stood over there for awhile and he was gesturing about maybe how this fumbling with the pants wasn't fumbling in the vein that somebody that fumbles, then he has done number two, maybe he was just brushing the sawdust off.

"In any event, this is something that the defendant would know whether he was fumbling with his pants as though he had just done number two or whether in the manner of the fastidious man, he is brushing himself off as a Fancy Dan.

"Since the defendant hadn't taken the stand and explained or elucidated on the thing that Mr. Villasenor said he saw, I think the inferences unfavorable to the defendant are the more likely and it is not just as reasonable that he was brushing sawdust off his clothes.

"But since murder is the unlawful killing of a human being with malice aforethought, the malice aforethought may be express or it may be implied, and it is implied on a situation where the circumstances show an abandoned and malignant heart.

"Now if this defendant got up from this bin after having had sex with this woman, where she freely and voluntarily

the same effect as in the country where rendered, and also the same effect as final judgments entered in this state." (Section 1915, Code of Civil Procedure of California.)

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starts out, as Mr. Maple starts out, she leads him down the alley, but she ends up in this semi-conscious beat up position, and he does nothing to aid or assist her except (indicating) Fancy Dan, brush himself off, and walk down the alley cool as a cucumber, I think this shows an abandoned and malignant heart.

"Now if one of you ladies and gentlemen in this jury box would suddenly slide off of your chair, no visible damage except that apparently you have slid off the chair in some kind of a coma, I would suggest to you that everybody in the courtroom would be rushing over to try and aid or assist you. Not this defendant, however. He brushes himself off and walks away.

"Now if that's what he was doing, brushing himself off, I think this shows an abandoned and malignant heart, which is an element of murder.

"Now Mr. Maple made some remarks about the absence of male sperm a few days later when the autopsy was performed.

"Well, again, ladies and gentlemen, this is something that the defendant if anyone in the whole world would know. This defendant would know whether or not he had sexual relations with this woman and this defendant would know whether or not he had used a contraceptive. This defendant would know whether or not he had had a vasectomy. This defendant would know whether or not he suffers from some disease that would make the existence of sperm impossible. He has remained silent."

R.T. 605-A168, lines 5 to 21:

"Now, Mr. Maple made some comment about Dr. Noguchi and he is saying some of these injuries or damages could have been caused by dragging. That is Dr. Noguchi's opinion. I assume the defendant heard it.

"If anybody in the whole world would know that this woman was not dragged, it would be the defendant. And he has remained silent in the face of this so-called accusation.

"Mr. Maple made a remark about the statement at Mexicali and therefore the defendant doesn't have to take the stand to testify, he has already told you his story.

"May I remind you, ladies and gentlemen, that at the time of that interview, the defendant didn't know that the woman was dead.

[*Footnote continued on page 16*]

This is the principle of the doctrine of res judicata,[3] which this Court has upheld, and see 29 Cal.Jur.2d p. 167, 26 Cal. State Bar Journal 366.

Sealfon v. *United States*, 332 US 575, 92 L.ed. 180;
United States v. *Oppenheimer*, 242 US 85, 87;
United States v. *De Angelo*, 138 F.2d 466, 468;
Frank v. *Mangum*, 237 US 309, 334;
United States v. *Adams*, 281 US 202, 205.

Justice Peters, in his dissenting opinion, discussed at length the matter of the Mexican evidence. (See pp. 5-8, *supra.*)

It is respectfully submitted that full faith and credit should be given to the courts of Mexico and that this evidence should not have been admitted and its use constituted a denial of due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

III.

Defendant Was Denied Fair Trial by the Use of Evidence From Mexico Where He Had No Opportunity to Defend Himself or Bring Witnesses From That Country.

This case involves a negro defendant, whose innocence of the crime of murder and rape would appear from the face of the record and the facts as set out in the record. There is nothing in the record to show that he raped Essie Mae Hodson. Nevertheless, the prosecutor tried the case wholly on the theory that murder was committed in the course of rape which, under the laws of the State of Cali-

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[*Footnote continued from page 15*]

"Now that he apparently knows she is dead and he is charged with the murder, he still remains silent."

[3] California says the doctrine of collateral estoppel applies. See fn. pt. 4a, *People* v. *Griffin*.

fornia, permits a death penalty without proof of wilfulness or deliberation or any other of the defenses available in a charge of murder.

To try a person on one charge and convict him on another violates due process of law.

Cole v. *Arkansas*, 333 US 196, 92 L.ed. 644;
Thompson v. *Louisiana*, 362 US 199, 206, 4 L.ed.2d 654;
Garner v. *Louisiana*, 368 US 157, 7 L.ed.2d 207, 80 ALR 2d 1362.

IV.

Section 190.1 of the Penal Code of California, Inherently and as Construed and Applied in This Case, Violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution in Permitting the Introduction Before the Jury of Extraneous Matters on the Issues of the Penalty and Whether He Should Receive Life or Death.

Under the provisions of Section 190.1 of the Penal Code of California, the prosecutor is allowed to introduce evidence before the jury not of the crime itself but of many collateral matters regarding the whole life of the defendant: his conduct in prison, if he has been there, his arrest, whether he is a good or bad person or prisoner, and a number of matters entirely unrelated to the alleged crime of which he has been convicted. Such a statute unfairly allows the prosecutor to present many extraneous matters and base a judgment of life or death not upon the crime charged but upon the personality of the defendant and on other alleged crimes or acts not charged in any indictment or information. In this case, the prosecutor, under the court's construction, was allowed to bring in witnesses to

testify to a crime allegedly committed in another country and for which there was no process for the defendant to defend himself. A statute which permits this violates due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

The unfairness of this section under the due process clause of the Fourteenth Amendment to the Constitution of the United States is easily discernible on slight reflection. Section 190.1 of the Penal Code permits and has permitted the bringing in of all kinds of extraneous evidence, unrelated to the crime on trial, and often years after it happened. A man who has had another criminal charge against him or has served a term in the penitentiary some years before is easily defaced before a jury and the penalty to be adjudged merely from the nature of the crime itself is eliminated. This is certainly unfair and unequal justice. The power of the prosecution to bring in evidence adverse to a defendant is much greater than the power of a defendant to obtain evidence that would help him or would controvert the prosecution's evidence. Police officers are required to make reports and these are kept on file for years, "until the time when man's memory runneth not to the contrary". These reports thereafter can be dug up and referred to years later in the proceedings on the question of the penalty.

The average defendant must rely on the testimony of witnesses he can obtain at the time of trial. Unless testimony was perpetuated because the case was appealed, there is a strong probability that in a relatively short time such evidence would be unavailable and a one-sided presentation of a past event, unrelated to the defendant, is brought before the jury to decide whether the man should receive life or death. Thus prison records, including hearsay mat-

ters that relate to the inside, possible quarrels, reports regarding defendant about which he knew nothing and had no chance for hearing or trial, are dragged before the jury to show that the defendant is a bad man and should be executed.

Additionally, it should be noted that a citizen of another state or another country ordinarily would not be willing to come at a distance and further, to incur the possible ill will of local police officials by testifying against prosecution witnesses in another jurisdiction. This would be especially true if the local police of another area testified on the side of the prosecution in the case in question.

Over and above all this, the prosecution usually has ample funds and can justify the expenditure of government or state funds to obtain these witnesses, whereas very few defendants would ordinarily be financially able to pay the expenses necessarily incurred by their witnesses. The instant case before this Court is an example. It is in connection with this case that we contend Section 190.1 of the Penal Code of California is unconstitutional and in violation of due process of law and the equal protection of the laws. It was here that the prosecution, with its ample funds for obtaining witnesses at state expense, was able to bring witnesses from Mexico, whereas the indigent defendant was unable financially to do so.

In the instant case, it is also quite possible that the prosecution witness from Mexico, now having a second chance at revenge, would be inclined to magnify rather than minimize the offense against her. The defendant had no funds or process of court to call the witnesses here to rebut the testimony. Without a transcript of their previous testimony, it resulted in the word of the defendant against the witnesses the prosecution was able to produce. Justice Peters, in his dissent in this case, said:

> "Thus, these biased witnesses, who could not convince a court in their own country, who were not believed when the facts were fresh in their minds, were permitted to testify as to the circumstances of the case, while the defense was required to rely on defendant's unsupported and uncorroborated denial of these circumstances."

There could be little doubt that such unfair treatment was, in large measure, the instrument by which the death penalty resulted.

Conclusion

WHEREFORE, petitioner prays that the judgment be reversed.

Respectfully submitted,

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APPENDIX A

[Crim. No. 7309. In Bank. July 18, 1963.]

THE PEOPLE, Plaintiff and Respondent, v. EDDIE DEAN GRIFFIN, Defendant and Appellant.

[1a, 1b] *Homicide—Evidence—Murder.*—A conviction of first degree murder with the punishment fixed at death was supported by evidence that defendant persuaded a man to allow him to stay temporarily in the apartment the man shared with the victim, that defendant assaulted the victim during the night and failed to deny her accusation that he was trying to rape her, that defendant was put out of the apartment, returned, was led outside again by the man who was struck by defendant and went for aid, that defendant was later seen walking away from a large trash box in which the victim was found bruised and bleeding from wounds which caused her death, that defendant admitted that he began an act of intercourse with the victim in the apartment, entered the trash box with her with the intent of having intercourse, and did, in fact, have intercourse with her there, and that the injuries suffered by the victim were such that she would not have been likely to engage in a voluntary act of intercourse.

[2] *Criminal Law—Appeal—Questions of Law and Fact—Functions of Jury and Trial Court.*—In a criminal prosecution, the weight of the evidence is for the jury to determine in the first instance, and the trial court after the verdict in the second instance.

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[1] See *Cal.Jur.2d*, Homicide, § 323; *Am.Jur.*, Homicide (1st ed § 581).

McK. Dig. References: [1] Homicide, § 145(2); [2] Criminal Law, § 1310; [3] Criminal Law, § 1325; [4, 5] Criminal Law, § 1011.1; [6] Criminal Law, § 393(1); [7] Criminal Law, § 617; [8-11, 13] Criminal Law, § 632; [12] Criminal Law, § 621; [14] Criminal Law, § 1092.

[3] *Id.—Appeal—Questions of Law and Fact—Conflicting Inferences.*—If the circumstances reasonably justify the jury's verdict, the reviewing court's opinion that those circumstances might also reasonably be reconciled with the innocence of defendant will not warrant interference with the jury's determination.

[4a, 4b] *Id. — Judgment — Procedure for Determining Penalty.*—On the penalty phase of a murder prosecution in which it was implicit in the jury's verdict that the killing was committed during an attempted rape, it was proper to admit evidence relating to a similar offense committed by defendant in Mexico subsequent to the murder for which he was convicted, despite the fact that defendant had received the equivalent of an acquittal in Mexican proceedings brought against him as a result of such subsequent offense; the jury was entitled to consider defendant's recurrent behavior on the issue of punishment, for it might conclude that such behavior would probably or possibly recur again were defendant given a life sentence and ultimately paroled.

[5] *Id.—Judgment—Procedure for Determining Penalty.*—On the penalty phase of a criminal trial the doctrine res judicata and collateral estoppel do not apply to foreclose inquiry into relevant circumstances surrounding an earlier crime of which defendant was convicted, since the fact that his criminal responsibility for an earlier crime has been fixed does not justify denying to the jury charged with fixing the penalty for another crime relevant evidence bearing on that issue.

[6] *Id.—Evidence—Other Crimes.*—If evidence of another offense is otherwise admissible, the fact that defendant was acquitted does not render the evidence inadmissible; an acquittal is merely an adjudication that the proof at the prior proceeding was not sufficient to overcome all reasonable doubt of the accused's guilt.

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[6] See *Cal.Jur.2d*, Evidence, § 137; *Am.Jur.*, Evidence (1st ed § 312).

[7] *Id.—Conduct of Counsel—Concluding Arguments—Scope.*—A prosecutor may argue any matter helpful to his case as long as he confines himself to the record and those inferences that may reasonably be drawn therefrom.

[8] *Id.—Conduct of Counsel—Concluding Arguments—Penalty Phase of Case.*—On the penalty phase of a murder prosecution in which evidence had been admitted concerning an attempted rape by defendant in Mexico for which he received the equivalent of an acquittal, it was not misconduct for the prosecutor, in his argument to the jury, to characterize defendant's attack on the victim in Mexico as a crime.

[9] *Id.—Conduct of Counsel—Concluding Arguments—Penalty Phase of Case.*—On the penalty phase of a murder prosecution, it was not misconduct for the prosecutor to refer to defendant during his argument as one who, knowing that he had a venereal disease, would have sexual intercourse, where the record showed that defendant admitted that he had had both gonorrhea and syphilis, but such knowledge did not deter him from forcing his sexual attentions on the victim and another woman.

[10] *Id.—Conduct of Counsel—Concluding Arguments—Penalty Phase of Case.*—On the penalty phase of a murder prosecution, it was not misconduct for the prosecutor to argue that the jury could take into account the fact that defendant probably lied about his prior record to Mexican authorities when he was arrested for another offense where a document from the Mexican court was introduced into evidence at the specific request of the defense.

[11] *Id.—Conduct of Counsel—Concluding Arguments—Penalty Phase of Case.*—On the penalty phase of a murder prosecution, it was not misconduct for the prosecutor to argue that in the event the jurors re-

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[8] See *Cal.Jur.2d*, Trial, § 437; *Am. Jur.*, Trial (1st ed § 467).

turned a verdict of life imprisonment, it would be their responsibility if defendant was released and harmed anyone where the prosecutor was merely replying to defense counsel's argument that the jurors would be responsible if they returned a death sentence and it was subsequently established that defendant was innocent.

[12] *Id.—Conduct of Counsel—Concluding Arguments—Statements in Refutation.*—It is not misconduct for a prosecutor to reply to defense arguments as long as his comments are based on the record.

[13] *Id.—Conduct of Counsel—Concluding Arguments—Penalty Phase of Case.*—On the penalty phase of a murder prosecution, it was not misconduct for the prosecutor to argue that if any juror to the very end of the deliberations believed that the case was a proper one for the death penalty, he should adhere to his view rather than compromise his judgment, since such argument was a proper statement of the law relating to the duties of jurors in their deliberations; the right of a juror to disagree in good conscience with his fellow jurors is a matter of universal knowledge.

[14] *Id. — Appeal — Reserving Questions — Argument of Counsel.*—Defendant may not be heard to object on appeal to the prosecutor's argument to the jury on the penalty phase of the case where he made no objection at the time the argument was made and did not ask the trial court to instruct the jury to disregard it.

APPEAL, automatically taken under Pen. Code, § 1239, subd. (b), from a judgment of the Superior Court of Los Angeles County. Joseph L. Call, Judge. Affirmed.

Prosecution for murder. Judgment of conviction imposing the death penalty, affirmed.

Ellery E. Cuff and Erling J. Hovden, Public Defenders, Charles A. Maple and James L. McCormick, Deputy Public Defenders, for Defendant and Appellant.

Stanley Mosk, Attorney General, Albert W. Harris, Jr., and Robert R. Granucci, Deputy Attorneys General, for Plaintiff and Respondent.

McComb, J.—This is an automatic appeal, pursuant to section 1239, subdivision (b), of the Penal Code, after a jury found defendant guilty of first degree murder and fixed the penalty at death.

Defendant contends:

[1a] First. *That the evidence was insufficient to sustain his conviction.*

This contention is devoid of merit. December 2, 1961, defendant encountered Eddie Seay and a friend of Eddie's named Al on a street corner in Los Angeles and asked directions to the 41st Street Club, a nearby bar. After receiving the directions, defendant gave Eddie a quarter, which was applied toward the purchase of a bottle of wine.

About 9 o'clock Eddie and Al entered the 41st Street Club and sat in a booth with Essie Mae Hodson and two other people. Eddie had been living with Essie Mae since 1957 and referred to her as his common-law wife.

Defendant, who was standing at the counter, was invited to the booth to join Eddie and the group. They drank wine and beer through the evening until Al left. Essie Mae left about 1 o'clock, and Eddie and defendant remained in the bar until 2 o'clock. Eddie was fairly intoxicated and thought defendant was, also.

At defendant's request for a place to stay that night, Eddie took him to the apartment he shared with Essie Mae and told him he could sleep on a day bed in the living room. Eddie then retired to the bedroom with Essie Mae and went to sleep.

Later the noise of a struggle awakened Eddie, and he went into the living room, where Essie Mae told him, in defendant's presence, that she had gotten up to go to the bathroom and that defendant had put his hand over her mouth and tried to make her accept him.

Eddie advised defendant to go and drink some coffee, and took him down the back stairs. On the way downstairs defendant asked if he could come back upstairs and if Eddie would talk to Essie Mae for him. Eddie refused, took de-

fendant outside, and went back upstairs the front way, locking the door.

Five minutes later Eddie heard defendant knocking and calling and the sound of glass breaking as defendant let himself in the back door.

Eddie got up, put on a pair of trousers, went to the back, and again took defendant downstairs. Meanwhile, Essie Mae went out onto a balcony.

At the bottom of the stairs defendant hit Eddie two or three times, causing some injuries. Eddie was able to break away and ran over to the 41st Street Club, where someone he knew agreed to go with him back to the apartment building. They were unable to find Essie Mae, and Eddie never saw her alive again.

About 7 o'clock the next morning Alfredo Villasenor walked down an alley behind the apartment building, looking for a piece of scrap lumber. In the alley was a very large trash box containing several feet of sawdust and some scrap wood. Villasenor saw defendant come out of the box buttoning his trousers and asked him what he was doing. Defendant replied, "Nothing," and walked away.

Villasenor searched around for a piece of wood and finally looked into the box. There he saw Essie Mae. She had blood on her clothes, was trembling, and had apparently suffered a severe beating. Villasenor called to someone working in an adjacent trailer lot, who, in turn, called the police.

The officers found Essie Mae sitting on top of the sawdust in the box. She appeared to be under great shock, was bleeding from the head, and could barely state her name. There was mud on her face, her clothes were wet, and there was blood in the sawdust.

Essie Mae was taken to Central Receiving Hospital, barely conscious and unable to answer questions. She was treated for her injuries, namely, bleeding from the left middle ear; a skull fracture; bleeding bruises on the left side of her scalp, both eyes, forehead, and lips; a 3-inch cut in her scalp; multiple abrasions of her ankles, hip and back; and a lack of blood pressure.

Essie Mae died the next afternoon. An autopsy was performed the following day, and the cause of her death was

determined to be "subdural hematoma, which was operated with skull fracture."

An examination of her genital organs failed to disclose the presence of spermatozoa. The coroner testified, however, that this would not preclude the possibility of her having had intercourse late on the night of December 2 or early morning, December 3. He also testified that a woman with the extensive injuries suffered by her would be in great pain and it would be very difficult for such a person to engage in voluntary sex relations.

In addition, the prosecution produced expert testimony to the effect that the venereal disease commonly known as gonorrhea would destroy the ability of a male to produce spermatozoa. Defendant admitted to police officers that he had had both gonorrhea and syphilis.

There were blood stains at the foot of the back stairs, drag marks in the alley, and blood stains and a woman's wig in the sawdust box. Essie Mae had worn such a wig.

Defendant was arrested in Mexicali, and when questioned by officers freely and voluntarily told them that on the evening of December 2 he was at the 41st Street Club, where he met Essie Mae, Eddie, and some other people and had a number of drinks with them; that during the evening he gave Eddie a $10 bill with which to buy some wine; that Eddie disappeared with the change after an argument; that Essie Mae also left; that he inquired where they lived and went there; that Essie Mae let him in and, after some discussion, told him not to worry, that she would make good the missing change by letting him have intercourse with her; that they had just begun when Eddie came in the room and started a fight, in which Essie Mae joined and which continued down the back stairs and into the alley; that Eddie ran off; and that Essie Mae, even though she had been hit several times in the fight, took him to the trash box, where she voluntarily engaged in the intercourse. Defendant said he left the box when he heard Villasenor, who he thought was a watchman, pass by.

The foregoing evidence substantially sustained the findings of fact of the jury.

[2] In a criminal prosecution the weight of the evidence is for the jury to determine in the first instance, and the trial court after the verdict in the second instance. [3] If, as in the present case, the circumstances reasonably justify the verdict of the jury, an opinion of this court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury. (*People* v. *Wein*, 50 Cal. 2d 383, 398 [13] [326 P.2d 457]; *People* v. *Newland*, 15 Cal.2d 678, 681 [104 P.2d 778].)

People v. *Craig*, 49 Cal.2d 313 [316 P.2d 947], and *People* v. *Granados*, 49 Cal.2d 490 [319 P.2d 346], are clearly distinguishable from the present case. In neither case was there direct or circumstantial evidence that the defendants had raped, or attempted to rape, their victims; and in the *Craig* case the only circumstantial evidence relative to that issue tended to the conclusion that the defendant did not attempt to perpetrate a rape (49 Cal.2d at p. 318 [2a, 3]).

Under those two cases, evidence that the defendant has brutally beaten or murdered his victim is insufficient to establish an intent to commit rape.

[1b] In the present case, the evidence is sufficient to establish an attempted rape.

First, there was evidence of defendant's assault on Essie Mae while she was in the apartment and his failure to deny her accusation that he was trying to rape her.

Second, defendant was seen buttoning his trousers as he walked away from the trash box, where Essie Mae sat bruised and bleeding. (Cf. *People* v. *Cheary*, 48 Cal.2d 301, 317 [20] [309 P.2d 431].)

Third, defendant admitted that he began an act of intercourse with Essie Mae in her apartment, entered the sawdust box with her with the intent of having intercourse, and did, in fact, have intercourse with her there. In this connection, the testimony of the autopsy surgeon that a woman with the injuries suffered by Essie Mae would not be likely to engage in a voluntary act of sexual intercourse is also important.

The facts which defendant asserts establish his innocence are equally consistent with his guilt.

[4a] Second. *That the evidence of defendant's assault on Amada Encinas was inadmissible on the issue of penalty.* This contention is likewise without merit. In the trial of the penalty issue the principal evidence produced by the prosecution related to a similar offense committed by defendant on December 19, 1961, in Mexicali, Mexico.

December 4, 1961, defendant left Los Angeles and traveled to Calexico, where he obtained a job at a cotton compress. There he met a man named Willie Kerr and told him his name was Willie Fairchild. Defendant told Kerr he did not have a place to stay, and Kerr let him have a room at the house which he shared with his common-law wife, Amada Encinas, across the border in Mexicali.

On December 19, 1961, while Amada was preparing lunch, defendant asked her for a towel. When she took it into his room, he grabbed her, hit and kicked her, tore her clothes off, and tried to rape her. He kicked her a number of times and so dislocated her arm that it had to be put in a cast for 15 days. He beat the woman severely, but despite the beating she refused to submit to him, and when Kerr arrived home, defendant jumped off the bed.

Kerr and defendant engaged in some kind of argument. Eventually the police were called, and Kerr and defendant were taken to jail. Defendant was brought to trial by a Mexican court on a charge of rape and released.

Defendant testified in his own behalf on the penalty issue of the trial. He gave an account of the incident involving Essie Mae Hodson roughly paralleling his story to the police officers, which story had been read at the trial on the issue of guilt, except that he denied having had intercourse with Essie Mae in the trash box.

His version of the incident involving Amada Encinas was that she had voluntarily agreed to have sexual intercourse with him for $2.00 and that her husband had come in and given her the beating.

Defendant contends that the trial court erred in admitting evidence, over his objection, of the assault on Amada Encinas, because a Mexican court had, in effect, found him not

guilty of that offense, and that its decision is res judicata on that issue.*

[5] It is established in this state that the doctrines of res judicata and collateral estoppel do not apply at the trial on the issue of penalty. In *People* v. *Purvis*, 52 Cal.2d 871, 881 [4] et seq. [346 P.2d 22], we held that on the penalty phase of a trial the rules of res judicata may not be invoked to foreclose inquiry into relevant circumstances surrounding an earlier crime of which a defendant was convicted, since the fact that his criminal responsibility for an earlier crime has been fixed does not justify denying to the jury charged with fixing the penalty for another crime relevant evidence bearing on that issue.

[4b] In the *Purvis* case the defendant had previously been convicted of the second degree murder of his wife. Upon his trial for the murder of another woman under circumstances markedly similar to those surrounding the killing of his wife, evidence respecting the latter killing was introduced on the issue of penalty. At page 882 [6] we said: "Moreover, in fixing the penalty for the murder of Mrs. Wilson, the jury was not bound by the former jury's finding that defendant's murder of his wife was of the second degree. Although that finding terminated defendant's liability to further prosecution for that crime, it was based on the evidence then before the jury that may have reflected only a reasonable doubt that a premeditated killing had occurred. Another killing as similar as the one that occurred here might dispel that doubt, and the jury fixing the penalty for the latter killing should be permitted to determine that issue on all the evidence before it without being bound by what another jury concluded on different evidence. In so doing, the second jury would not be redetermining defen-

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* Since the State of California and the Government of Mexico are not identical parties and were not in privity, and this proceeding is for a different offense, this case does not involve the doctrine of res judicata but, rather, collateral estoppel. (Cf. *Teitelbaum Furs, Inc.* v. *Dominion Ins. Co., Ltd.*, 58 Cal.2d 601, 604 [1] [25 Cal.Rptr. 559, 375 P.2d 439]; 29 Cal.Jur.2d (1956) Judgments, § 215, p. 169.)

dant's criminal responsibility for the killing of his wife, but fixing the penalty for his killing of Mrs. Wilson."

The same principle is applicable here. Implicit in the verdict of the jury was a finding that the killing was committed during an attempted rape; and in fixing the penalty for such killing, this jury was entitled to consider the circumstances surrounding the crime of which defendant was accused in Mexico, there being a marked similarity between the circumstances surrounding the two attacks.

In each instance defendant had persuaded the man with whom the woman was living to allow him to stay temporarily in the home they were sharing; while defendant was in a room alone with the woman and the man was either away from the house or asleep in another room, he tried to induce the woman to have sexual relations with him and, when she refused, beat her severely. In each instance he contended that the woman had voluntarily agreed to have intercourse with him for a sum of money.

As stated in *People* v. *Purvis, supra*, at page 881 [5]: "... The jury was entitled to consider this recurrent behavior on the issue of punishment, for it might conclude that the behavior would probably or possibly recur again were defendant given a life sentence and ultimately paroled."

The fact that defendant may have received the equivalent of an acquittal in the Mexican proceedings is immaterial. [6] An acquittal is merely an adjudication that the proof at the prior proceeding was not sufficient to overcome all reasonable doubt of the guilt of the accused. (*In re Anderson*, 107, Cal.App.2d 670, 672 [237 P.2d 720] [hearing denied by the Supreme Court]; cf. *Teitelbaum Furs, Inc.* v. *Dominion Ins. Co., Ltd., supra*, 58 Cal.2d 601, 605.) Accordingly, if evidence of another offense is otherwise admissible, the fact that the defendant was acquitted does not render the evidence inadmissible. (*People* v. *Massey*, 196 Cal.App. 2d 230, 234 [4] [16 Cal.Rptr. 402]; *People* v. *Crisafi*, 187 Cal.App.2d 700, 707 [10 Cal.Rptr. 155] [hearing denied by the Supreme Court].) Third. *That the prosecution was guilty of prejudicial misconduct in its argument to the jury on the issue of penalty.*

Defendant contends that it was error for the prosecutor to argue (1) that defendant had committed a crime in Mexicali; (2) that defendant, knowing he had a venereal disease, had sexual intercourse with women; (3) that defendant probably lied about his prior record to the Mexican authorities; and (4) that the jury would be responsible if defendant was paroled and then killed, raped, or infected anybody; he also contends (5) that the prosecutor improperly asked the jurors to hold out for the death penalty.

[7] It is settled that the prosecutor may argue any matter helpful to his case as long as he confines himself to the record and those inferences which may reasonably be drawn therefrom. (*People* v. *Atchley,* 53 Cal.2d 160, 174 [14, 15] [346 P.2d 764]; *People* v. *Cheary, supra,* 48 Cal.2d 301, 317 [20, 21]; *People* v. *Burwell,* 44 Cal.2d 16, 39 [33] [279 P.2d 744].)

Applying the foregoing rule, it is apparent that defendant's claims of error are without merit.

[8] First, it was not misconduct to characterize defendant's brutal attack on Amada Encinas as a crime.

[9] Second, the prosecutor's reference to defendant as one who, knowing that he had a venereal disease, would have sexual intercourse is supported by the record. Defendant admitted that he had had both gonorrhea and syphilis, but this knowledge did not deter him from forcing his sexual attentions upon Essie Mae Hodson and Amada Encinas.

[10] Third, the document from the Mexican court was introduced in evidence at the specific request of the defense, and the prosecutor could properly argue that the jury could take into account the fact that defendant may have made untrue statements to the Mexican authorities about his record at the time he was booked.

[11] Fourth, it was not improper for the district attorney to argue that in the event the jurors returned a verdict of life imprisonment, it would be their responsibility if defendant was released and harmed anyone. He was merely replying to defendant's argument that the jurors would be responsible if they returned a death sentence and it was

subsequently established that defendant was innocent. [*12*] It is not misconduct for a prosecutor to reply to defense arguments as long as his comments are based on the record, as were these. (*People* v. *Rosoto*, 58 Cal.2d 304, 364 [73] [23 Cal.Rptr. 779, 373 P.2d 867].)

[*13*] Fifth, it was not misconduct for the prosecutor to argue that if any juror to the very end of the deliberations believed that this was a proper case for the death penalty, he should adhere to his view rather than compromise his judgment. This was a proper statement of the law relating to the duties of jurors in their deliberations. The right of a juror to disagree in good conscience with his fellow jurors is a matter of universal knowledge. (*People* v. *Wade*, 53 Cal.2d 322, 332 [10] [1 Cal.Rptr. 683, 348 P.2d 116]; *People* v. *Wong Loung*, 159 Cal. 520, 535 [114 P. 829]; *People* v. *Tate*, 124 Cal.App. 48, 50 [2] [12 P.2d 102].)

[*14*] In addition, defendant may not now be heard to object to the district attorney's argument, since he made no objection at the time it was made and did not ask the trial court to instruct the jury to disregard it. (*People* v. *Robillard*, 55 Cal.2d 88, 102 [21] [10 Cal.Rptr. 167, 358 P.2d 295, 83 A.L.R.2d 1086]; *People* v. *Turville*, 51 Cal.2d 620, 636 [20] [335 P.2d 678].)

It is apparent that there is no error in the record.

The judgment is affirmed.

Gibson, C. J., Traynor, J., Schauer, J., Tobriner, J., and Peek, J., concurred.

PETERS, J., Concurring and Dissenting.—I agree with the majority that the portion of the judgment finding defendant guilty of murder in the first degree is supported by substantial evidence and should be affirmed. But, in my opinion, the portion of the judgment imposing the death penalty should be reversed, because inadmissible evidence that was prejudicial was erroneously introduced on that phase of the trial.

Preliminarily it should be pointed out that the determination of whether the death penalty or life imprisonment shall be imposed rests solely in the discretion of the jury.

The presence of aggravating circumstances is not necessary to impose the death penalty, nor need there be ameliorating circumstances to warrant the jury in imposing a life sentence. It follows that, if any major error on this phase of the trial in the introduction of evidence occurs that has any relationship to the character of defendant, such error must be held to have been prejudicial. Just such an error, in my opinion, here occurred.

On the guilt phase of the trial the prosecution produced evidence that the victim died after being brutally beaten and raped by defendant. Then, on the penalty phase of the trial, the prosecution, over objection, was permitted to introduce evidence that shortly after the offense here was committed, and while defendant was still at large, he brutally beat and tried to rape a woman in Mexico under circumstances remarkably similar to the beating and rape here involved. The prosecution was permitted to introduce full and complete evidence concerning the details of this claimed other offense. As pointed out by the majority this was the "principal evidence produced by the prosecution" on this phase of the trial. It permitted the prosecution to argue that if defendant committed this second offense he was the type of brutal and dangerous man that should never again be at liberty and should suffer the death penalty. If defendant had actually committed this offense in Mexico, the evidence would clearly have been admissible under the "common plan" exception to the general rule excluding evidence of other crimes. That is what most of the cases cited by the majority hold. But if defendant had not committed this crime in Mexico, permitting the prosecutor to argue and this jury to find that he had, and use this fact as the basis of imposing the death penalty, was gravely prejudicial. The obvious purpose of this evidence was to show the jury that defendant was habitually the kind of man that went around beating and raping women, and should never again be at large. It permitted this jury to, in effect, find that defendant, in fact, had committed this other crime, and therefore should die.

Defendant denied having committed the Mexican offense. This created no more than a conflict in the evidence. But the real question is whether defendant had committed this

crime. It had been judicially determined in Mexico that there was not sufficient evidence to show that defendant had committed the offense. As the majority correctly point out, "[d]efendant was brought to trial by a Mexican court on a charge of rape and released," that is, acquitted. But, in the prosecution in Los Angeles, the two principals in the Mexican case were permitted to testify to the very facts that had led the Mexican court and investigating officials to release the defendant. Defendant was compelled to rely on his version of the facts, unsupported by corroborating testimony. The credibility of the prosecution witnesses had already been judicially passed on adversely in Mexico. But now the defendant was called upon to once again face those very same witnesses. He was called to answer the argument of the prosecution that the Mexican court had "made a mistake" and "I ask you ladies and gentlemen not to perpetuate the error." The prosecuting attorney several times told the jury that through his Mexican witnesses he had demonstrated that defendant had committed the offense in Mexico. The jury was told by the rulings on the evidence, and the arguments of the prosecutor, that it could not only believe these witnesses who testified as to the Mexican offense, but that it could, in effect, determine for itself whether the Mexican offense had been committed. They were told by the prosecutor that, if they came to the conclusion that the offense had been committed, they could consider that fact in determining what penalty to impose. This was unfair and deprived defendant of a fair trial on the penalty issue.

The general rule is, of course, that evidence of other offenses is not admissible. To this rule there are several exceptions—but all of them relate to "other offenses." It is a far cry from the general rule to now hold, as do the majority, that, even though the defendant has been acquitted of the prior charge, evidence that he in fact committed the offense is now admissible. I realize that the rules of evidence and the proper scope of inquiry, on the penalty phase of the trial, are very broad. By section 190.1 of the Penal Code, on that phase of the trial, evidence "of the defendant's background and history," can be admitted. This court, quite properly, has interpreted this provision very

liberally, both for defendant and the prosecution. Under the broad provisions of this section it is proper to inquire into all facets of the character of defendant and to show the jury just what kind of man he is. Under this liberal rule of admission it may be that the prosecution on the penalty phase of the trial could introduce the fact that defendant had been *charged* in Mexico with rape and that he had been acquitted. That is part of his background and history. But to detail the circumstances of the alleged crime through the mouths of witnesses that had not been believed in Mexico was to place the defendant in double jeopardy for the same offense in a very real sense. If there is to be a collateral estoppel against a defendant (*Teitelbaum Furs, Inc.* v. *Dominion Ins. Co., Ltd.*, 58 Cal.2d 601, 604 [25 Cal.Rptr. 559, 375 P.2d 439]) there should also be a collateral estoppel in his favor.

Aside from this reason why detailed evidence of other crimes alleged to have been committed in a foreign country where defendant has been acquitted in that country should not be admitted, there is another sound practical consideration that compels the exclusion of such testimony. Indigent defendants who have to be represented by the public defender, as did defendant here, are not in a position of financial equality with the prosecution, nor do they have the same means of persuasion as does the prosecution. This court and the United States Supreme Court, in a whole series of recent cases, and properly so, have been quite zealous in protecting the rights of indigent defendants against improper invasion. The defense is in no position, as is the prosecution, to induce witnesses to come to this country to testify. In this very case, the record shows that the public defender's office, with its limited resources, did send an investigator to Mexico to try and induce the Mexican trial judge, and the Mexican investigating officers, to come to Los Angeles to testify, even offering to pay their expenses. The witnesses would not come. There was no way to compel them to come. But the prosecution could and did induce the two principals in the Mexican court to come to Los Angeles to testify. Thus, these biased witnesses, who could not convince a court in their own country, who were not believed when the facts were fresh in their

minds, were permitted to testify as to the circumstances of the case, while the defense was required to rely on defendant's unsupported and uncorroborated denial of these circumstances. Thus, the rule, approved by the majority, results in a denial of due process and a denial of that fair trial guaranteed by the state and federal Constitutions.

I would send the case back for a retrial of the penalty issue.

APPENDIX B

Constitutional Provisions and Statutes Involved

Fifth Amendment, United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1915, Code of Civil Procedure of California:

> A final judgment of any other tribunal of a foreign country having jurisdiction, according to the laws of such country, to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this state.

Section 187, Penal Code of California:

> Murder defined. Murder is the unlawful killing of a human being, with malice aforethought.

Section 189, Penal Code of California:

All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

Section 190, Penal Code of California:

Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in Section 190.1, and every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life.

Section 190.1, Penal Code of California:

The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the decision or verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the com-

mission of the crime. The burden of proof as to the age of said person shall be upon the defendant.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty.

In any case in which defendant has been found guilty by a jury, and the same or another jury, trying the issue of penalty, is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial of the issue of penalty, or order a new jury impaneled to try the issue of penalty, but the issue of guilt shall not be retried by such jury.

Article 1, Section 13, California Constitution:

In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial.